

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

VIRTUAL BUSINESS ENTERPRISES,)
LLC d/b/a STEWART MANAGEMENT)
CO., a Delaware limited liability company,)
and GORDON W. STEWART,)

Plaintiffs,)

v.)

MARYLAND CASUALTY COMPANY, a)
Maryland corporation,)

Defendant.)

C.A. No. 07C-12-070 MMJ

Submitted: May 6, 2010

Decided: May 19, 2010

ORDER

***Upon Application for Certification of Interlocutory Appeal
of Defendant Maryland Casualty Company***

DENIED

Marc S. Casarino, Esquire, White and Willaims, LLP, Wilmington, Delaware,
Attorneys for Defendant, Maryland Casualty Company

Francis Murphy, Esquire, Murphy & Landon, Wilmington, Delaware, Attorneys
for Plaintiffs

JOHNSTON, J.

1. By Opinion dated April 9, 2010, the Court denied defendant Maryland Casualty Company's Motion for Summary Judgment. The Court found that the definition of "advertisement" (in the insurance policy at issue) clearly and unambiguously includes the electronic communications the insureds sent to a small group of selected clients. As a result, the Court found that the term "personal and advertising injury" includes the publication of slanderous, libelous, or disparaging material to that small group of selected clients. The Court also found that the allegations in the related Court of Chancery complaint set forth a *prima facie* case of defamation or disparagement, giving rise to Maryland Casualty's duty to defend.

2. Maryland Casualty has moved for an order certifying an interlocutory appeal to the Delaware Supreme Court. Maryland Casualty argues that the April 9, 2010 Opinion decides a question of law that has not been, but should be, ultimately settled by the Supreme Court. The specific issues are whether "(i) a solicitation to a handful of clients constitutes an 'advertisement,' (ii) the solicitations in question were disparaging, ...(iii) the claim is excluded from coverage[, and (iv)] the coverage under the insurance policy at issue was illusory." Maryland Casualty asserts that these issues qualify for interlocutory appeal

pursuant to Delaware Supreme Court Rules 41(b)(i)(original question of law) and Rule 42(b)(iii) (substantial issue).

3. Maryland Casualty further contends that interlocutory appeal would serve considerations of justice and clarify unsettled questions of law, including the Supreme Court’s holding in *Axis Reinsurance Corp. v. HLTH Corp.*, 2010 WL 1610623 (Del.).

4. Supreme Court Rule 42(b) provides the criteria for determining whether an issue should be certified for interlocutory appeal. One of the five criteria set forth in Supreme Court Rule 42(b)(i) - (v) must be satisfied. Under Rule 42(b)(i), the Court may look to the criteria established by Rule 41. In this case, there are not conflicting trial court decisions (Rule 41(b)(ii)) and the unsettled question does not relate to constitutional or statutory construction (Rule 41(b)(iii)).

5. It is not disputed that in the context of this case, the Court’s interpretation of the terms “advertisement” and “personal and advertising injury” are questions of law of the first instance in Delaware. (*See* Rule 41(b)(i)(original question of law). However, contrary to Maryland Casualty’s arguments, these are not “substantial issues” because the decision did not reverse or set aside a prior decision, as required by Rule 42(b)(iii). Additionally, the Court does not find the

recent decision in *Axis Reinsurance* to be sufficiently identical to this case so as to compel interlocutory appeal in the interests of justice under Rule 42(b)(v).

6. A two-day trial is scheduled to begin October 11, 2010.

Interlocutory appeal would delay resolution of this case and not result in any substantial savings in litigation costs at this juncture. There is no reason why the issues of first impression cannot be addressed, if necessary, on appeal following trial.

THEREFORE, defendant Maryland Casualty Company, having failed to demonstrate that any Delaware Supreme Court Rule 42(b) criteria necessitate the exercise of this Court's discretion to certify the questions, the Application for Certification of Interlocutory Appeal is hereby **DENIED**.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston